(1) Supreme Court, U.S. FILED

03 • 5 JUN 25 2003

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DETROIT, DETROIT, L.L.C.,

Petitioner,

v.

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MARK K. WASVARY
Counsel of Record
CARL G. BECKER
BECKER & WASVARY, P.L.L.C.
117 Walnut
Rochester, MI 48307
(248) 650-9400

Attorneys for Petitioner

181471

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

26 pp

QUESTION PRESENTED

Federal Rule of Civil Procedure 24(a) allows intervention as of right upon a timely application

> when the applicant claims an interest relating to the . . . transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by the existing parties.

FRCP 24(a). The relevant case law interpreting that rule indicates that a Motion to Intervene should not be denied based on timeliness alone, but rather is to be determined from all the circumstances. The Sixth Circuit, nonetheless, made a ruling denying a Motion to Intervene based on timeliness alone and failed to take into consideration the important constitutional issues at stake in complete contradiction of the relevant case law and in conflict with several other circuit courts.

The question presented is whether a Motion to Intervene as of right pursuant to Federal Rule of Civil Procedure 24(a) may be denied based on timeliness alone.

LIST OF PARTIES AND STATEMENT PURSUANT TO RULE 29.6

The Respondents not named in the caption are: The City of Detroit, Michigan; Kwame Kilpatrick; Mary Ann Mahaffey; Kenneth V. Cockrel, Jr.; Sheila Cockrel; Brenda M. Scott; Sharon McPhail; Alberta Tinsley-Talabi; Alonzo W. Bates; Barbara Rose Collins; Kay Everett; Greektown Casino, L.L.C.; and Detroit Entertainment, L.L.C.,

Petitioner Detroit, Detroit L.L.C., has no parent corporation and no publicly held company owns 10% or more of its stock.

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Appendix A — Order Of The United States Court Of Appeals For The Sixth Circuit Dated And Filed March 28, 2003 ..... 1a

Appendix B — Rule Involved 4a

Petitioner respectfully Petitions for a Writ of Certiorari to review the Order dated March 28, 2003 of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

Petitioners Motion to Intervene which is the subject of this request for Certiorari was only ruled upon by the United States Court of Appeals Sixth Circuit and thus there is no District Court ruling in regard to same. The Court of Appeals Order (per Norris Batchelder and Gibbons, Circuit Court Judges) denied Petitioners Motion to Intervene by Order dated March 28, 2003.

STATEMENT OF JURISDICTION

The Court of Appeals entered its Order on March 28, 2003 which is reprinted in the Appendix at A. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Federal Rule of Civil Procedure 24 relevant to this Petition is reprinted in the Appendix at B.

STATEMENT OF THE CASE

In November of 1996, the Michigan Electorate approved Proposal E, a ballot initiative that authorized three casinos in the City of Detroit. Proposal E was supported financially and otherwise by intervening appellees, Atwater Entertainment Associates (hereinafter Atwater) and Greektown Casinos (hereinafter Greektown). Proposal E

granted preferences to entities that provided the most financial and political support towards the enactment of that legislation. In February of 1997, Lac Vieux Desert Band of Lake Superior Chippewa Indians (hereinafter Lac Vieux) filed a Complaint in Federal District Court for the Western District of Michigan, challenging these preferences. After Lac Vieux filed its Complaint, the Michigan Legislature amended the legislation to remove said preferences.

In June of 1997, the City of Detroit (hereinafter City) enacted an Ordinance entitled, "Casino Development Competitive Selection Ordinance" (hereinafter "Ordinance"), which is the crux of the instant litigation since in August of 1997, Lac Vieux amended its Complaint to challenge this Ordinance. Similar to the initial Proposal E, the Ordinance allowed preferential treatment for two of the three available licenses to Atwater and Greektown, based upon their financial and political support for the enactment of Proposal E.

In August of 1997, your Petitioner , Detroit, Detroit, L.L.C. (hereinafter Detroit, L.L.C.) made a bid for one of the three casino licenses available, along with several other developers. Detroit, L.L.C. was denied a casino license following the first round in the selection process. The aforesaid two favored entities qualified for the preference bestowed by the Ordinance, and that preference was later determined to be unconstitutional by the Sixth Circuit. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. The Michigan Gaming Control Board, et al.*, 276 F.3d 876 at 879 (6th Cir. 2002) (hereinafter *Lac Vieux II*). Each of those two entities, Atwater and Greektown were selected for a license. *Barden Detroit Casino, L.L.C. v. City of Detroit*, 59 F. Supp. 2d 641, at 651-652 (1999). The third entity to receive a license, MGM Grand Detroit L.L.C. (hereinafter

MGM) presented its development agreement to the city as a package which would be tied to the two preferred entities, thereby essentially assuring MGM that it would receive the one remaining license (although technically not by preference). MGM skewed its development agreement in order to tie it to the preference. The City Counsel then approved development agreements with these three entities which allowed them to build and operate temporary casino facilities. *Id* at 653. These temporary facilities have been in operation for up to three years.

The instant action was filed by Lac Vieux on February 26, 1997, which was not a participant in the bidding process, but was determined by the Sixth Circuit to be "ready and able" to participate. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board, et al.*, 172 F.3d 397 at 406 (6th Cir. 1999) (hereinafter *Lac Vieux I*). Since the initial filing, the Complaint was amended twice and the parties filed respective Motions for Summary Judgment. On January 11, 2002, the Sixth Circuit determined that the Ordinance was unconstitutional and in violation of the First Amendment's Free Speech Clause. *Lac Vieux II* at 879. The matter was remanded to the District Court for proceedings consistent with the Sixth Circuit ruling. The proposals by Lac Vieux for rectification of the harm created by the Constitutional infirmity included injunctions, conservatorship and re-bidding amongst others. The District Court then refused to take any affirmative action other than to suggest that Lac Vieux's attorney fees might be awarded. It thereafter denied a Motion for Reconsideration, causing an appeal, once again, to the Sixth Circuit.

In the interim, in April of 2002, MGM following all the rulings involving constitutionality moved to intervene.

Notwithstanding the elapse of over five years since the original filing of the instant action, the District Court summarily granted MGM's request.

Following the District Court's rejection of providing any form of relief for what the Sixth Circuit called "illegitimate" licenses (*Lac Vieux II* at 879), your Petitioner filed to intervene in the District Court in July of 2002, however it decided to withdraw the Motion when it determined that Lac Vieux would be appealing the District Court's decision and therefore intervening in the District Court would serve no useful purpose. Indeed, Lac Vieux did file a third appeal to the Sixth Circuit seeking a remedy for the harm created by the unconstitutional Ordinance. Lac Vieux in its appeal, once again, seeks to compete for a casino license and development agreement without the interference of the preference based on the unconstitutional Ordinance which "basically sought to end the high-stakes competition for two of the three Detroit casino licenses before it really began". *Lac Vieux II*, 276 F.3d at 880. Since the temporary casino facilities have already been created, common sense dictates that any new bidding process would be in regard to the construction of permanent casino facilities. On September 12, 2002, the Sixth Circuit granted Lac Vieux an injunction pending the appeal which enjoins developers from commencing construction of permanent casino facilities. (Slip op. at 3, Sixth Cir. Sept. 12, 2002). That appeal is still pending as indicated above, the matter before this Court is review of the Court of Appeal order denying your Petitioner's right to intervene. That order was entered even though only the intervening parties timely objected and even though MGM was given the right to protect its position well after the exhaustion of five years of litigation.

Pursuant to Supreme Court Rule 14.1(g)(ii), the basis for Federal jurisdiction in the Court of first instance in this matter, was based on the fact that it was an action arising under the Constitution and laws of the United States and the Federal District Court for the Western District of Michigan had jurisdiction pursuant to 28 U.S.C. § 1331. Further, the original Complaint filed in this matter was seeking a declaratory judgment and injunctive relief pursuant to 42 U.S.C. § 1983 and the Federal District Court had jurisdiction pursuant to 28 U.S.C. § 1343(3) and 28 U.S.C. § 1343(4).

On February 6, 2003, Detroit, L.L.C. filed a Motion to Intervene at the appellate level in the Sixth Circuit. Since the original filing of the Motion to Intervene was in the Sixth Circuit, this petition is actually the first request for review of that Motion on an appellate level. On March 28, 2003, the Sixth Circuit denied Detroit, L.L.C.'s Motion to Intervene. This Petition for a Writ of Certiorari followed.

REASONS FOR GRANTING THE PETITION

The Petition should be granted for three reasons. First, the Sixth Circuit order denying the Motion to Intervene sets a precedence that regardless of the rights being denied the Petitioner or those similarly situated, a party's right to intervene and protect its rights are solely discretionary. This decision, in the context of an undisputed finding of unconstitutionality has a wide spread affect, undermining the strength and vitality of the First Amendment and review should be granted to prevent this irreversible, irrevocable harm.

Second, the Sixth Circuit abused its discretion when denying Petitioner's Motion to Intervene.

Third, the Sixth Circuit's decision conflicts with holdings of this Court and other Courts as it relates to the timeliness of filing a Motion to Intervene.

I. The decision below establishes a precedence which, without any finding of prejudice to existing parties to the litigation, disregards a persons constitutionally guaranteed right to protect and preserve its First Amendment free speech guarantee.

The Supreme Court of the United States decides matters of public importance. *The Monrosa v. Carbine Black Exports, Inc.* 359 U.S. 180 at 184, 79 S. Ct. 710 (1959). A "denial of intervention as of right is reviewed de novo, except for the timeliness element, which is reviewed for an abuse of discretion." *United States v. Tennessee*, 260 F.3d 587, 592, 50 Fed. Serv. 3d 748 (2001). However in cases raising First Amendment issues "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that the 'judgment does not constitute a forbidden intrusion on the field of free expression'". *Bose Corporation v. Consumers Union of United States, Inc.* 466 U.S. 485, 499, 104 S. Ct. 1949, 1958 (1984).[1]

The Sixth Circuit in its order of March 28, 2003 denied Detroit, L.L.C.'s Motion to Intervene for no other reason other than calling it "untimely". "Untimely" in the context of Federally protected First Amendment concerns should be

1. The opinion in *Bose* is based upon an interpretation of a lower Court's findings under Federal Rule of Civil Procedure 52(a).

defined by balancing the injury and prejudice to the existing parties and the delay in proceedings, if any, with the intervenor's right to be assured adequate and full protection of its violated rights. *Januszíewicz v. Sun Ship Building & Dry Dock Company*, 677 F.2d 286, 293 (3d Cir. 1982). With such vague findings on such a highly protected area, the ruling would support non-protection of paramount constitutional rights for the sake of brevity and obscure supportive criteria. Vagueness is the essence of unconstitutional. *Plummer v. City of Columbus, Ohio*, 414 U.S. 2, 3, 94 S. Ct. 17, 18 (1973). The existing ruling promotes the perpetuation of what the city's ordinance initiated. The result of the ruling, if permitted to stand would be the potential of lack of rectification of the harm created by the ordinance through negotiation, with everyone whose federal rights were violated left with no remedy.

II. The Sixth Circuit abused its discretion when it denied Petitioner's Motion to Intervene based solely on timeliness.

It is well settled that denial of a Motion for Intervention as of right is an appealable final order. *Railroad Train Men v. Baltimore and Ohio R.R. Co.*, 331 U.S. 519, 524, 91 L. Ed. 1646, 67 S. Ct. 1387 (1947).

Although as previously stated, Petitioner believes that when important federal questions are involved the timeliness element of a Motion to Intervene is reviewed de novo, it is Petitioner's position that the Sixth Circuit abused its discretion in denying Petitioner's Motion to Intervene.[2]

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2. The Court of Appeals will find an abuse of discretion for denial of Motion to Intervene as of right only when left with the (Cont'd)

Timeliness "should be evaluated in the context of all relevant circumstances". *United States v. Tennessee*, 260 F.3d 587, 592 (2001). (*See also Usery v. Brandel*, 87 FRD 670, 674 (1980 W.D. Michigan); citing to *NAACP v. New York*, 413 U.S. 345, 366, 93 S. Ct. 2591, 2603, 37 L. Ed. 2d 648 (1972)). Intervention should not be denied if an intervening party could be readily assimilated into the case. *Usery* at 675. Absolute measures of timeliness should be ignored. *Stupak - Thrall v. Glickman*, 226 F.3d 467, 475 (6th Cir. 2002); *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994). There are "circumstances where it is proper to grant an application for post judgment intervention". *Usery* at 675.

In the instant matter the Sixth Circuit virtually ignored all the case law and provided no analysis of the circumstances surrounding the Motion to Intervene and Petitioner's interest in the lawsuit.[3] Contrary to case law in its Order of March

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(Cont'd)
definite and firm conviction that the Court committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors or where it improperly applies the law or uses an erroneous legal standard. *United States v. Tennessee*, 260F.3d 587 at 592 (2001).

3. Petitioner concedes that the Sixth Circuit correctly stated that there are five factors to consider in regard to timeliness; 1) the point to which the suit has progressed; 2) the purpose for which intervention is sought; 3) the length of time preceding the application during which the proposed Intervener knew or should have known of his interest in the case; 4) prejudice to the original parties by allowing intervention and 5) existence of unusual circumstances weighing against or in favor of intervention. *Jordan v. Michigan Conf. of Teamsters Welfare Fund*, 207 F.3d 854, 862 (6th Cir. 2000). However after stating the factors to consider, the lower Court did not make any analysis of those factors.

28, 2003, the Sixth Circuit in a five sentence paragraph simply states that it has decided that the Motion of Detroit, L.L.C. must be denied as untimely.[4] The only conclusion that can be drawn from the Sixth Circuit's decision is that the length of time that has passed was the sole basis of its decision and as such is an abuse of discretion. Given the obvious conclusion that Detroit, L.L.C., like Lac Vieux, was a "ready and able" entity affected by the unconstitutionality, it has standing. *Lac Vieux I* at 406. Since no remedy has been fashioned at this time for those entities which were ready and able, the rejection of participation in the Court only perpetuates the unconstitutional harm. At first the Court found that the preference was given for active participation in the Ordinance enactment. Now preference seems to be given by the Court to those who had active involvement in the ordinances nullification even though a remedy has yet to be determined.

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4. The relevant paragraph states as follows

> The Motion of Detroit LLC must be denied as untimely. This litigation has been pending for more than six years, with two prior appeals to this court. The district court has now entered a final judgment, which is the subject of this third appeal. Detroit LLC argues that by at least January of 2002, when this court concluded that the city ordinance was unconstitutional in *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 276 F.3d 876 (6th Cir.), *cert. denied*, 122 S. Ct. 2589 (2002), it had standing and was aware of its interest in this litigation. Detroit LLC has not demonstrated that its motion to intervene is timely.

(See order dated March 28, 2003 reprinted in the Appendix at 3a).

III. The decision of the Sixth Circuit conflicts with the decisions of this Court and other Circuits as it relates to the timeliness of filing a Motion to Intervene.

The Sixth Circuit's decision ignores the decision of this Court which is that timeliness of a Motion to Intervene is to be determined from all the circumstances. *NAACP v. New York*, 413 U.S. 345 at 366, 93 S. Ct. 2591, 2603, 37 L. Ed. 2d 648 (1972).

Further, the Sixth Circuit's decision conflicts with several other Circuit Courts as it relates to timeliness of a Motion to Intervene. The Fifth Circuit has held that absolute measures of timeliness should be ignored, *Sierra Club v. Espy,* 18 F.3d 1202, 1205 (5th Cir. 1994).

In a 1984 decision the Ninth Circuit held that mere lapse of time alone should not be determinative of a Motion to Intervene. *United States v. State of Oregon*, 745 F.2d 550, 552 (1984). Further, the Court should consider the reason for the delay including new and expanded negotiations between the existing parties which indicates a reason to favor granting the application. *Id.*

The District of Columbia has had several cases on point which most closely resemble the stage of the proceedings at which this Petitioner sought intervention. In a recent decision that Court held that "a post judgment Motion to Intervene in order to prosecute an appeal is timely" when the potential inadequacy of representation came into existence only at that stage. *Smoke v. Norton*, 346 U.S. App. D.C. 277, 252 F.3d 468, 470 (D.C. Cir. 2001). Further, the Circuit Court for the District of Columbia has held that a request to intervene as of right should be allowed where the applicant seeks to

participate in remedial and appellate phases of the case and agrees not to reopen matters previously litigated. *Hodgson v. United Mine Workers of America*, 153 U.S. App. D.C. 407, 473 F.2d 118 (D.C. Cir. 1972); *Natural Resources Defense Counsel v. Costle*, 183 U.S. App. D.C. 11, 561 F.2d 904 at 906-907 (D.C. Cir. 1977) (in *Costle* the Court held it was an abuse of discretion to deny application for intervention where the applicants sought to participate in a settlement agreement's application).

Similarly the Third Circuit has held that where intervention is sought not to reopen proceedings that would otherwise remain closed but to participate in an upcoming phase of the litigation intervention is appropriate and timely as long as there is no undo prejudice to the existing parties. *Janusziewicz v. Sun Ship Building & Dry Dock Company*, 677 F.2d 286, 293 (3d Cir. 1982).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MARK K. WASVARY
Counsel of Record
CARL G. BECKER
BECKER & WASVARY, P.L.L.C.
117 Walnut
Rochester, MI 48307
(248) 650-9400

Attorneys for Petitioner

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED AND FILED MARCH 28, 2003

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 02-1893/1996

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe,

Plaintiff-Appellant/Cross-Appellee,

v.

THE CITY OF DETROIT, MICHIGAN; KWAME KILPATRICK; MARY ANN MAHAFFEY; KENNETH V. COCKREL, JR.; SHEILA COCKREL; BRENDA M. SCOTT; SHARON MCPHAIL; ALBERTA TINSLEY-TALABI; ALONZO W. BATES; BARBARA ROSE COLLINS; KAY EVERETT,

Defendants-Appellees,

ATWATER ENTERTAINMENT ASSOCIATES, L.L.C.; GREEKTOWN CASINO, L.L.C.; DETROIT ENTERTAINMENT, L.L.C.,

Intervenors-Appellees,

MGM GRAND DETROIT, L.L.C.,

Intervenor-Appellee/Cross-Appellant,

MICHIGAN GAMING CONTROL BOARD,

Amicus Curiae.

Appendix A

ORDER

Before: NORRIS, BATCHELDER, and GIBBONS, Circuit Judges.

The plaintiff appeals the denial of its motion for additional relief in this declaratory judgment action in which the district court found that a Detroit ordinance governing the selection of three casino developers was unconstitutional. Intervenor MGM Grand Detroit, L.L.C. ("MGM") cross appeals the denial of its motion for summary judgment as moot. On February 6, 2003, Detroit, Detroit, L.L.C. ("Detroit, LLC"), an unsuccessful bidder, filed a motion to intervene in these appeals. The parties oppose the motion to intervene. In addition, the plaintiff moves for expedited consideration of the motion.

Although there is no appellate rule governing Detroit LLC's motion to intervene on appeal, it is generally accepted that the courts of appeals have discretion to grant intervention. The standards for intervention set forth in Fed. R. Civ. P. 24 provide guidance for the exercise of our discretion. Both intervention as of right and permissive intervention require that the application to intervene be timely. *See Stupak-Thrall v. Glickman*, 226 F.3d 467, 472-73 (6th Cir. 2000); *Jordan v. Michigan Conf. of Teamsters Welfare Fund*, 207 F.3d 854, 862 (6th Cir. 2000); *Cuyahoga Valley Ry. Co. v. Tracy*, 6 F.3d 389, 395 (6th Cir. 1993). "The question of timeliness is considered with regard to five factors: 1) the point to which the suit has progressed; 2) the purpose for which the intervention is sought; 3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; 4) the prejudice to the original parties due to the

proposed intervenor's failure, after he or she knew or reasonably should have known of his interest in the case, to apply promptly for intervention; and 5) the existence of unusual circumstances militating against or in favor of intervention." *Jordan v. Michigan Conf. of Teamsters Welfare Fund*, 207 F.3d at 862.

The motion of Detroit LLC must be denied as untimely. This litigation has been pending for more than six years, with two prior appeals to this court. The district court has now entered a final judgment, which is the subject of this third appeal. Detroit LLC argues that by at least January of 2002, when this court concluded that the city ordinance was unconstitutional in *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 276 F.3d 876 (6th Cir.), *cert. denied*, 122 S. Ct. 2589 (2002), it had standing and was aware of its interests in this litigation. Detroit LLC has not demonstrated that its motion to intervene is timely.

The plaintiff s motion to expedite a ruling is **GRANTED**, and the motion to intervene is **DENIED**.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Clerk

APPENDIX B — RULE INVOLVED

UNITED STATES CODE ANNOTATED
FEDERAL RULES OF CIVIL PROCEDURE FOR THE
UNITED STATES DISTRICT COURTS
IV. PARTIES
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No claim to Orig. U.S. Govt. Works.
Amendments received to 05-23-03

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made

pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.